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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 526

AL HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Vol. II, 19-25; Pet. App. 1-7) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1964 (Vol. II, 26). A petition for rehearing was denied on August 25, 1964 (Vol. II, 37, 41; Pet. App. 8). The petition for a writ of certior-

ari was filed on September 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the immunity provisions of the Federal Communications Act of 1934 were properly applied to petitioner.

2. Whether the district court could proceed under Rule 42(a), F.R. Crim. P., to try petitioner for contempt and sentence him to imprisonment for one year.

STATUTES AND RULE INVOLVED

Section 203(c) of the Communications Act of 1934, 48 Stat. 1064, 1071, 47 U.S.C. 203(c), provides in pertinent part:

> No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; * * *.

Section 409(i) of the Communications Act of 1934, 48 Stat. 1064, 1097, 47 U.S.C. 409(l), provides in pertinent part:

> No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission * * * or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act * * * on the ground or for the rea-

son that the testimony or evidence * * * required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence * * * except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Section 501 of the Communications Act of 1934, 48 Stat. 1064, 1100, as amended, 68 Stat. 30, 47 U.S.C. 501, provides in pertinent part:

> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or wilfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this Act, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; * * *.

Rule 42(a), F. R. Crim. P., provides:

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the

facts and shall be signed by the judge and entered of record.

STATEMENT

On July 31, 1963, in the Southern District of New York, petitioner was called as a witness before a grand jury which was investigating possible violations of the Communications Act of 1934 and 18 U.S.C. (Supp. V) 1952 (interstate travel or transportation in aid of racketeering enterprises). Government counsel advised petitioner that the inquiry concerned possible violations of Sections 203(c) and 501 of the Communications Act and 18 U.S.C. 1952, and that petitioner had the constitutional right to decline to answer questions on grounds of possible self-incrimination (Vol. II, 8, 9). Thereafter, petitioner refused to answer, on grounds of possible self-incrimination, questions as to whether he had attended a dice game in Florida in February of 1963, whether he had been a partner in that dice game, whether one Carmine Tramunti had been a partner with petitioner in that dice game, whether petitioner knew one John Manarite, and whether petitioner knew if Manarite had made a telephone call in January 1963 to Flushing, New York, in order to lease premises for a Florida dice game (Vol. II, 8-10). Government counsel advised petitioner that inasmuch as the inquiry concerned possible violations of the Communications Act, he would be given immunity from prosecution under that Act for his testimony and therefore could not rely upon the claim of privilege (Vol. II, 8-9). Petitioner persisted in his refusal to answer the questions and re-

quested counsel. Thereupon, petitioner was called before District Judge McLean, who continued the proceedings until the following day so that petitioner could obtain counsel (Vol. II, 6-7).

On August 1, 1963, government counsel, petitioner and petitioner's attorney appeared before Judge McLean. During argument, government counsel stated that the grand jury was investigating possible violations of Sections 203(c) and 501 of the Communications Act and 18 U.S.C. 1952 arising out of the placement of certain telephone calls from Florida to New York City regarding the promotion of an illegal dice game (Vol. I, 61-64). At the conclusion of the proceedings, the court said that it had "considerable doubt" regarding the propriety of the procedure employed, and that it would not direct petitioner to answer the particular questions (Vol. I, 73). The court said that the grand jury subpoena should contain reference to an investigation of violations of the Communications Act, and that the particular questions to be propounded should involve "use of the telephone and not just the general questions about was he in [a] crap game" (Vol. I, 73).

On August 7, 1963, petitioner re-appeared before the grand jury pursuant to a subpoena to appear and "give testimony in regard to an alleged violations of Sections #501 and #203(c), Title #47, United States Code" (see Vol. I, 20). Government counsel advised petitioner of his constitutional right against self-incrimination, and, when petitioner pleaded the privilege to one question, advised that the inquiry concerned possible violations of Sections 203(c) and 501 of the Commu-

nications Act, and that petitioner would be given immunity under Section 409(i) of that Act for his testimony (Vol. I, 20-21). Petitioner said that he understood (Vol. I, 20-21). Thereafter, petitioner refused to answer before the grand jury, on grounds of possible self-incrimination, the following questions (Vol. I, 22-24, 26):

Q. Now, once again, Mr. Harris, let me ask you: do you know of a phone call made by one, John Manarite, in January or February of this year, from Florida to Flushing, New York, in connection with the leasing of a premises for the purpose of establishing a dice game in Ojus, Florida?

Q. Now, Mr. Harris, do you know whether or not Mr. Manarite used a pay telephone?

Q. Do you know whether or not he used a private premises to make that telephone call?

Q. Do you know Mr. Harris, whether anybody else's premises was used by Mr. Manarite for that telephone call?

Q. Mr. Harris, do you know whom Mr. Manarite was working for, or in partnership with, in connection with the leasing of these premises that he talked about in his telephone conversation with the person or persons he talked to on the telephone, from Florida to Flushing, New York?

Q. Mr. Harris, do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or in partnership with one Carmine Tramunti?

Q. Mr. Harris, do you know whether or not, at the time of the making of this phone call, Mr.

Manarite was in the employ, or in partnership with Mr. Thomas Lucchese?

Q. Mr. Harris, I ask you: do you know any of the person or persons who were the employers or partners of Mr. Manarite, at the time of the telephone call in question?

Q. Mr. Harris, in connection with this phone call, were you a partner in the operations of the dice game at the premises in Ojus, Florida?

Q. Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida?

Shortly thereafter, petitioner and his attorney, government counsel and the grand jury appeared before Judge McLean. The transcript of the grand jury proceedings was read (Vol. I, 9), and argument was heard regarding the propriety of granting immunity under the circumstances. The court, desiring "further thought on the matter," adjourned the proceedings until the following day (Vol. I, 18).

On the following day—August 8, 1963—Judge McLean and all parties appeared, together with the grand jury, in the grand jury room. After pointing out that he was satisfied that petitioner would receive complete immunity for his testimony, Judge McLean directed petitioner to answer the questions before the grand jury (Vol. I, 29). After Judge McLean and petitioner's attorney left the room, government counsel propounded the same questions to petitioner which he had refused to answer the previous day. Petitioner refused to answer such questions on

grounds of possible self-incrimination (see Vol. I, 32-35, 52-55).

Later the same day, petitioner and his attorney, government counsel and the grand jury appeared before Judge McLean. The court was "opened by proclamation" (Vol. II, 1). After the transcript of the grand jury proceedings was read (Vol. I, 32-35), petitioner was sworn as a witness and the court propounded the same questions which petitioner refused to answer before the grand jury and directed that he answer each question (Vol. I, 37-39). Petitioner refused to answer the questions on the ground of possible self-incrimination (Vol. I, 37-39). At the conclusion of the questioning, the court said, "Does anybody want to say anything further?" (Vol. I, 39). Pursuant to the request of government counsel, the court repeated that petitioner would be given immunity from prosecution for his testimony (Vol. I, 39). The following transpired (Vol. I, 39-41):

> [by the court] Do you still refuse, Mr. Harris?
> The Witness: I respectfully refuse to answer on the grounds it would tend to incriminate me.
> The Court: Anything further?
> Mr. Maloney [government counsel]: No, your Honor. I think the record speaks for itself, and I would ask your Honor to find this witness in contempt of court under Rule 42(a) of the Federal Rules of Criminal Procedure.
> Mr. Polakoff [counsel for petitioner]: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the minutes and I want to have an op-

portunity to discuss them and consider them with my client and look up the law.

I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that there could be no possible violation of the Communications Act.

I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

I also would request that the contempt hearing be held in public.

The Court: Your request is denied. This is a contempt committed in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42(a).

* * * *

Mr. Polakoff: This room has been sealed.

The Court: No, this room is not sealed. This is a session of the United States District Court. We opened this court a few minutes ago before we began this proceeding. It is a completely open proceeding.

* * * *

I judge Mr. Harris guilty of contempt of court, and I sentence him to imprisonment for a term of one year.

After fixing bail pending appeal, the court announced that it would "be glad to consider a reduction of sentence" if petitioner so moved after having testified before the grand jury (Vol. I, 45).

DISCUSSION

1. Petitioner first contends, in essence (Pet. 8-12), that the immunity provisions of the Communications Act were improperly applied to him in that the grand jury was not really investigating possible violations of the Communications Act but was interested primarily in an alleged interstate dice game in violation of 18 U.S.C. 1952. The short answer, however, is that Section 409(i) of the Act requires only that the cause or proceeding be "based upon or growing out of any alleged violation of this Act." The fact that the grand jury was also investigating possible violations of 18 U.S.C. 1952 (interstate travel or transportation in aid of racketeering enterprises) does not mean that the immunity provisions of the Communications Act were inapplicable. See *Marcus* v. *United States*, 310 F. 2d 143 (C.A. 3), certiorari denied, 372 U.S. 944; *United States* v. *Testa*, 326 F. 2d 730 (C.A. 3), certiorari denied, 376 U.S. 931, both of which rejected similar arguments.

The ten questions propounded to petitioner before the grand jury and the court—which, upon his refusal to answer, formed the basis for his contempt adjudication—concerned possible unlawful use of telephone service in violation of the Communications Act. Petitioner's argument that it is not a violation of the Communications Act "for a user or customer of the telephone service to violate any regulation promulgated by a carrier" was also made and rejected in the cases cited above. Under Section 501 of the Communications Act, "[a]ny person who willfully and

knowingly * * * causes or suffers to be done any act, matter or thing * * * prohibited or declared to be unlawful * * *" in that Act commits an offense punishable by fine and imprisonment. Section 203(c) of the Act provides that no carrier shall provide communications service "except as specified" in its tariff. The tariff filed by the American Telephone and Telegraph Company, concurred in by the Southern Bell Telephone and Telegraph Company, provides (as do those of most, if not all, such tariffs) (Vol. II, 2-3):

> The service is furnished subject to the condition that it will not be used for an unlawful purpose.

Thus, one who "willfully and knowingly" utilizes telephone services for the purposes of promoting gambling operations or other purposes unlawful under the laws of a State or the United States causes the telephone company to provide service "for an unlawful purpose." This constitutes a violation of Section 203 (c) of the Communications Act and is punishable under Section 501 of that Act.[1] See *Marcus* v.

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[1] In addition to the provisions of Section 501 of the Communications Act, penalizing anyone who willfully causes or suffers an act to be done in violation of the Act, the general aider and abettor statute, 18 U.S.C. 2, may also be applied to make individuals liable as principals to violations of Section 203(c) of the Act. Section 2(b) of Title 18, U.S.C., punishes as a principal one who "willfully *causes* an act to be done which if directly performed by him *or another* would be an offense against the United States" (emphasis added). It is well established that one who causes the commission of an offense by an innocent agent or instrumentality is guilty as

United States, supra; Testa v. *United States, supra.* A number of persons have been convicted for violation of Sections 203(c) and 501 of the Communications Act for such misuse of telephone services. *United States* v. *Andrews et al.*, Crim. No. 10,288 (E.D. Ky.) (judgments of convictions entered on July 31, 1962), pending on appeal, No. 15,623, C.A. 6; *United States* v. *Whitaker*, Crim. No. 21,122 (E.D. Pa.) (judgment of conviction entered on July 24, 1963).

Since petitioner's initial contention has twice been squarely rejected by the Third Circuit and there is no conflicting decision of any other court of appeals, and since this Court has twice denied certiorari on this issue in recent Terms, we do not believe that the first question presented in the petition warrants consideration by this Court.

2. Petitioner contends that in light of the dictum in *United States* v. *Barnett*, 376 U.S. 681, 694-695 n. 12, that "[s]ome members of the Court are of the view that * * * punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses," he could not be tried summarily under Rule 42(a) of the Federal Rules of

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a principal (*United States* v. *Giles*, 300 U.S. 41; H. Rep. No. 304, 80th Cong., 1st Sess.; see Reviser's Note to 18 U.S.C. 2(b)), even though he was incapable in the first instance of committing the substantive crime (S. Rep. No. 1020, 82d Cong., 1st Sess., Sec. 17B, pp. 7-8; see *Phillips* v. *United States*, 218 F. 2d 385, 387 (C.A. 9); *Logsdon* v. *United States*, 253 F. 2d 12, 15 (C.A. 6); *Benchwick* v. *United States*, 297 F. 2d 330, 332-333 (C.A. 9); *Haggerty* v. *United States*, 5 F. 2d 224, 225 (C.A. 7); *United States* v. *Melekh*, 193 F. Supp. 586, 592 (N.D. Ill.)).

Criminal Procedure and given a sentence of one year's imprisonment. See *District of Columbia* v. *Clawans*, 300 U.S. 617, 627-628. We believe this case to be distinguishable from *Barnett* for several reasons, among which are that petitioner's contempt was committed in the presence of the court and that this case does not involve, as did *Barnett*, the imposition of punishment "*after* compliance with the court's order has been secured." 376 U.S. at 754 (Mr. Justice Goldberg, dissenting, emphasis in original).

In the Matter of Local 825, International Union of Operating Engineers, No. 488, this Term, pending on petition for certiorari, involves a similar question as to a court's power summarily to impose punishment for contempt beyond that permitted for petty offenses. We have there acquiesced in the granting of the petition on that issue. In order to enable the Court to consider the basic question as it arises in various circumstances, we do not oppose review here of the same issue.

CONCLUSION

The grant of the petition for a writ of certiorari should be limited to the second question presented.

Respectfully submitted.

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